SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
MAR 4 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1126

SOCIETE ANONYME DE GERANCE ET D'ARMEMENT,
Petitioner,

—v.—

JOSEPH MULLER CORPORATION ZURICH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN C. MOORE
Counsel for Petitioner
One State Street Plaza
New York, N. Y. 10004
(212) 344-6800

C. RAYMOND NELSON
JOHN DE P. DOUW
of Counsel

THE ALPERT PRESS, INC., 644 PACIFIC ST., BKLYN, N. Y.

TABLE OF CONTENTS

	PAGE
Citations to Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	3
The Foreign Treaty Involved	5
The Federal Rule of Civil Procedure Involved	5
Statement	6
Reasons for Granting Certiorari	12
I—The decisions of both the District Court and Court of Appeals have imputed to Rule 17(b) a meaning which contradicts the intended purpose of the said Rule when applied to alien nationals	12
II—The decision of the United States Court of Appeals for the Second Circuit is confusing in that it applied different reasoning and results to two actions between the same parties arising from the same transaction and has by so doing, in effect, nullified a valid commercial treaty between two friendly foreign powers and has granted to respondent greater rights than accorded to it by the foreign sovereign to which it owes its creation and, conversely, abridged the rights of petitioner	16
III—The subject matter of this action is so lacking in relevant contacts with the forum that to take cognizance thereof could not, in any manner, benefit any citizen of the United States and would serve no purpose other than further to burden the already congested courts of the United States with litigation among foreigners	19
CONCLUSION	21

PAGE

APPENDIX:

A—Opinion below in the United States District Court for the Southern District of New York (314 F. Supp. 439) A1

Memorandum Decision granting motion to modify opinion order to the extent of certifying question for appeal A6

Order granting certification to the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. §1292(b) A8

B—Order granting leave to appeal B1

Opinion of the United States Court of Appeals for the Second Circuit (451 F.2d 727) B2

Order denying petition for a rehearing B6

TABLE OF CASES CITED

Banco Nacional de Cuba v. *First National City Bank*, 270 F. Supp. 1004 (S.D.N.Y. 1967), *rev'd*, 431 F.2d 394 (2d Cir. 1970), *cert. granted—vacated and remanded*, 400 U.S. 1019 (1971) 17

Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398 (1964) 17, 18

Belgenland, The, 114 U.S. 355 (1885) 19

Canada Malting Co. v. *Paterson Steamships Ltd.*, 285 U.S. 413 (1932) 19

Carter v. *Carter Coal Co.*, 298 U.S. 238 (1936) 15

Charter Shipping Co. v. *Bowring Jones & Tidy Ltd.*, 281 U.S. 515 (1930) 19

Converse v. *Hamilton*, 224 U.S. 243 (1912) 15

PAGE

Garis v. *Compania Maritima San Basilio, S. A.*, 261 F. Supp. 917 (S.D.N.Y. 1966), *aff'd*, 386 F.2d 1557 (2d Cir. 1967) 19

Gulf Oil Corp. v. *Gilbert*, 330 U.S. 501 (1947) 19

Hilton v. *Guyot*, 159 U.S. 113 (1895) 16

Langnes Green, 282 U.S. 531 (1931) 19

Maggie Hammond, The, 76 U.S. (9 Wall) 435 (1869).. 19

Quirin, Ex parte, 317 U.S. 1 (1942) 15

Railroad Retirement Board v. *Alton R. Co.*, 295 U.S. 330 (1935) 15

Rickert Rice Mills v. *Fontenot*, 297 U.S. 110 (1936) 15

United States v. *Bankers Trust Co.*, 294 U.S. 240 (1935) 15

United States v. *Curtiss-Wright Corp.*, 299 U.S. 304 (1936) 17

United States v. *United Mine Workers*, 330 U.S. 258 (1947) 15

Youngstown Co. v. *Sawyer*, 343 U.S. 579 (1952) 15

OTHER AUTHORITIES CITED

Barron & Holtzoff, Federal Practice and Procedure, Vol. 2, § 485, p. 40 (Wright ed. 1961) 13

Hearings Before House Comm. on the Judiciary, 75th Cong., 3rd Sess., Ser. 17 at 20 (1938) 13

Moore, Federal Practice, Vol. 3A, ¶ 17.21 at 771 (2d ed. 1970) 13

Wright & Miller, Federal Practice and Procedure, Vol. 6, § 1561 at pp. 733-34 (1971) 13

Statutory Material Cited

PAGE

15 U.S.C. § 1 *et. seq.* 7

15 U.S.C. § 18 7

28 U.S.C. § 1292(b) 10

28 U.S.C. § 1333 11

Federal Rules of Civil and Appellate Procedure

Rule 12(b), Fed. R. Civ. P. 7

Rule 17(b), Fed. R. Civ. P. 8, 12, 13

Rule 5, Fed. R. App. P. 10

United States Constitution

Article II, Section 2 17

Article III, Section 2 11

IN THE

Supreme Court of the United States

October Term, 1971

No. .....

SOCIETE ANONYME DE GERANCE ET D'ARMEMENT,
Petitioner,

—v.—

JOSEPH MULLER CORPORATION ZURICH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Societe Anonyme De Gerance Et D'Armement, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit entered on November 11, 1971, affirming an order of the United States District Court for the Southern District of New York entered and filed on June 23, 1970, as amended by a separate order containing certification to the Court of Appeals, pursuant to 28 U.S.C. § 1292(b), entered and filed on May 19, 1971, and answering the question certified in the affirmative.

Citations to Opinions Below

The opinion of the United States District Court for the Southern District of New York, printed in Appendix A hereto, *infra* p. A1, is reported in 314 F. Supp. 439. The order modifying the said order to the extent of granting certification to the United States Court of Appeals for the Second Circuit (28 U.S.C. § 1292[b]), is unreported and is printed in Appendix A hereto, *infra* p. A8. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra* p. B2, is reported in 451 F.2d 727.

Jurisdiction

The order of the United States Court of Appeals for the Second Circuit was entered on November 11, 1971, *infra* p. B2. Rehearing was denied on December 6, 1971 *infra* p. B6. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), Rule 20 of the Rules of this Court and Article III, Section 2, of the Constitution of the United States.

Questions Presented

1. Whether a United States District Court has jurisdiction over the subject matter of a civil action commenced by an alien corporation created under the law of and domiciled in Switzerland against an alien corporation created under the law of and domiciled in France arising out of a contract for the transportation of goods by sea, in foreign commerce, where the foreign sovereigns creating said corporate parties have, by bilateral treaty, mandated that any such action must be commenced only in the courts of the nation of the domicile of the defendant?

2. Whether the decision of the United States Court of Appeals for the Second Circuit would, if permitted to stand, have the effect of nullifying a valid commercial treaty be-

tween two friendly foreign powers, as respects the parties hereto, and grant to respondent (plaintiff below) greater rights than given to it by the sovereign who created it and, conversely, abridge the rights of petitioner?

3. Whether the subject matter of this action is so lacking in relevant contacts with the forum that to take cognizance thereof would not, in any manner, benefit citizens of the United States and would serve no purpose other than further to burden the already congested courts of the United States with foreign litigation?

Constitutional Provisions and Statutes Involved

The provisions of the United States Constitution involved are:

Article II, Section 2, Clause 2:

> "He (the President) shall have power, by and with the Advice and Consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls . . . and all other Officers of the United States whose Appointments are not herein otherwise provided for . . ."

Article III, Section 2, Clause 1:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to all Cases of admiralty and maritime Jurisdiction; . . . to Controversies . . . between Citizens of different States, . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

The statutory provisions involved are as follows:

28 U.S.C. § 1254:

"Case in the court of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * * * * "

28 U.S.C. § 1332:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign States or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties."

28 U.S.C. § 1333:

"The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

28 U.S.C. § 1337:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

The Foreign Treaty Involved

On or about June 16, 1869 the respective sovereign authorities of France and Switzerland entered into a treaty known as a Convention on Jurisdiction and Enforcement of Judgments in Civil Matters. 10 Recueil des Traites 289 (Fr), 9 Recueil Official des Lois et Ordonnances de la Confederation 880 (Switz).[1] Article I of the said Convention provides as follows:

"* * * *

> In all disputes concerning personal property and personal matters, either civil or commercial, which may arise between French and Swiss (Nationals), the plaintiff shall be bound to institute his action before the natural judges of the defendant. The same shall hold true for recourse actions for indemnity against a third party, whatever may be the court where the original case is pending. If a French or a Swiss defendant has no known domicile or residence either in France or Switzerland, he may be sued before the court within whose jurisdiction the domicile of the plaintiff is.

* * * *"

The Federal Rule of Civil Procedure Involved

Rule 17(b), Fed. R. Civ. P., provides as follows:

> "The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized."

---

[1] The treaty was at all relevant times in full force and effect and was and is binding upon the citizens, including corporations, of France and Switzerland. Translation and interpretation of treaty contained in affidavits of Dean Paul Chauveau (French jurist) and Dr. Paul Krayer (Swiss barrister) submitted to the courts below on behalf of petitioner (see Appendix in the United States Court of Appeals, 2d Cir., at pp. 74a-78a, 116a[1]).

Statement

Petitioner contends that since both petitioner and respondent are alien corporations deriving their existence and powers, as well as limitations, under the laws of other sovereign nations, both of which are recognized by the United States and with which the United States maintains friendly diplomatic relations, the courts of the United States are bound to recognize, and to give effect to, limitations imposed upon the corporate powers of the said alien corporations by the sovereign authorities under which they were created. Giving effect to the laws of the two sovereign nations to which petitioner and respondent owe their respective corporate existences, respondent is without legal capacity to sue petitioner in the courts of the United States or in the courts of any nation other than the Republic of France; that under the Franco-Swiss Treaty this Swiss respondent does not even have the capacity to sue petitioner in Switzerland.

The respondent Joseph Muller Corporation Zurich, hereinafter referred to as "Muller," originally commenced two separate but related actions against petitioner Societe Anonyme de Gerance et D'Armement, hereinafter referred to as "SAGA," to recover damages incident to and arising out of a certain written charter party agreement between Muller and SAGA for the carriage by sea, on board vessels of SAGA, of a certain chemical product known as vinyl chloride monomer, hereinafter referred to as "VCM". In the complaint in Action No. 1 Muller alleged that SAGA failed to transport the product in the manner agreed upon and further alleged that respondent Muller exercised an irrevocable option, which had allegedly been granted by petitioner, to extend the written charter party agreement for an additional term, under the same terms and conditions as the original contract, but that petitioner breached this option agreement by refusing to transport and deliver additional VCM.[2]

[2] The complete text of the charter party agreement was annexed as an Exhibit to the complaint in Action No. 1.

In Action No. 2, which is the subject of this petition and which was brought simultaneously against petitioner and several other named defendants,[3] respondent Muller alleges that after the breach of the charter party agreement as alleged in Action No. 1, petitioner SAGA and the other parties named as defendants met together in London, England where they allegedly conspired and agreed to fix the transportation charges to be assessed for transportation of VCM at the price demanded by petitioner SAGA and further attempted to eliminate respondent Muller from the market by approaching the said respondent's suppliers, including a supplier in the State of Texas, and negotiating direct transportation of the said product to respondent Muller's customers without the intermediacy of respondent Muller, all of which said respondent alleges was in violation of 15 U.S.C. §§1 et. seq. and §§3 and 7 of the Clayton Act, 15 U.S.C. §18 (1964).

Petitioner moved in the District Court for an order, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, dismissing the complaint in each of the two separate but related actions on the ground that the United States District Court lacked jurisdiction over the subject matter thereof and, in the alternative, to stay Action No. 1 pending arbitration between the parties pursuant to an arbitration clause in the charter party agreement in controversy.

---

[3] The complaint in Action No. 2 joined as additional defendants Petromar Societe Anonyme and Gazocean France, both alleged to be French corporations, Mundo Gas, S.A., a British corporation, Gazocean International, a Swiss corporation, Gazocean U.S.A., alleged to be a New York corporation affiliated with or subsidiary to Gazocean International and Gazocean France, and four fictitiously named defendants, John Doe, Richard Roe, John Doe Corporation and Richard Roe Corporation whose nationalities are not specified in the complaint. Of these several defendants only Gazocean U.S.A. has been served with process and has appeared in this action, although not a party to this appeal.

The grounds for petitioner's motion to dismiss both actions and the basis for its present contentions are that under the terms of a treaty between the governments of France and Switzerland, known as the Convention on Jurisdiction and Enforcement of Judgment in Civil Matters,[4] which was in full force and effect at all relevant times, in all civil or commercial matters arising between citizens of France (being the nation of petitioner's creation and domicile), and citizens of Switzerland (being the nation of respondent Muller's creation and domicile), the plaintiff is bound to institute his action in the courts of the nation of the defendant.[5] By reason of the said treaty petitioner contends that respondent Muller lacks the legal capacity to sue petitioner in the courts of the United States or in any court other than the courts of the Republic of France.

In a brief opinion the District Court (MacMahon, *J.*), held that Rule 17(b) of the Federal Rules of Civil Procedure, which provides that "the capacity of a corporation to sue or be sued (in a federal court) shall be determined by the law under which it was organized," refers only to a general capacity to sue and be sued and once it is established that a corporation has such general capacity the rule is satisfied, regardless of the laws of the state of incorporation limiting the locale where a corporation can sue or be sued. Having found that respondent Muller possessed such

---

[4] 10 Recueil des Traites (Fr.), 9 Recueil Official des Lois et Ordonnances de la Confederation (Switz.) (1869).

[5] The unrebutted evidence of foreign law submitted on behalf of petitioner was that the definition of "civil or commercial" includes all actions which may be resolved by the payment of a sum of money and is applicable to any dispute concerning a contract between two parties as well as to all tort or quasi-tort claims in which the plaintiff claims money damages before a civil court. (See Affidavits of Dean Paul Chauveau and Dr. Paul Krayer, *supra* note 1). Respondent submitted no evidence of French or Swiss law to contradict or otherwise rebut the interpretation of the Franco-Swiss Treaty propounded on behalf of petitioner.

general capacity, the District Court held that it met the capacity requirements of Rule 17(b) and that the "venue limitations imposed by the treaty do not incapacitate plaintiff from suing defendant, nor do they affect subject matter jurisdiction."[6]

With respect to Action No. 1, sounding in breach of contract, the District Court held that "since neither party disputes the validity of the charter party's arbitration clause or the arbitrability of the dispute under that clause, the intention of the parties can best be effectuated by staying the action for breach of contract pending arbitration of the dispute as to the venue for arbitration, as well as the dispute concerning the original charter party agreement and the alleged extension of that agreement."[7]

Accordingly, the District Court denied petitioner's motion to dismiss the complaint in either action but granted petitioner's alternative motion, in part, in Action No. 1 to the extent of staying the said Action No. 1 pending arbitration.[8]

Thereafter, on motion by petitioner, the District Court amended its memorandum decision to include certification to the United States Court of Appeals for the Second Circuit of the following question:

> "Whether the United States District Court for the Southern District of New York has jurisdiction over the subject matter of a civil action brought by an alien corporation created under the law of Switzerland against an alien corporation domiciled in France, where the Republic of Switzerland has prohibited the plaintiff to sue the defendant anywhere except in France."[9]

---

[6] A3.
[7] A4-5.
[8] A5.
[9] A6.

Thereafter, by petition dated May 28, 1971, petitioner SAGA applied for permission to appeal to the Court of Appeals, pursuant to Title 28 U.S.C. §1292(b) and Rule 5 of the Federal Rules of Appellate Procedure, and the said petition was granted by order dated June 9, 1971 which further provided that the clerk be directed to "transmit a copy of the motion and of the brief, when filed, to the Legal Advisor of the Department of State with a letter indicating that the Court would welcome the views of the Department."[10] The two separate but related actions were consolidated for the purpose of appeal to determine the single issue raised in both cases.

The Department of State directed a letter to the Clerk of the United States Court of Appeals for the Second Circuit concluding as follows:

> "Although the 1869 Treaty has no binding effect on the United States, the provisions of that agreement are entitled to consideration by U.S. Courts on the same basis as national law enacted by foreign sovereigns. Rules of conflicts of laws and comity provide the legal framework for assessing the effect to be given foreign law. Application of these rules is within the province of the judicial branch."

In effect the State Department turned over this aspect of our foreign relations to the judicial branch of the government.

While recognizing that considerations of international comity would suggest that United State courts should decline to exercise jurisdiction in a purely private action such as Action No. 1 which was brought to recover damages for an alleged breach of a charter party agreement, the

---

[10] B1.

United States Court of Appeals for the Second Circuit reversed the order appealed from with respect to that action and dismissed the complaint therein on the ground that there was no basis for federal jurisdiction over that action because the requisite diversity of citizenship is not present in an action where all parties are aliens.[11] However, with respect to Action No. 2, although giving token recognition to the Franco-Swiss Treaty in question, the Court of Appeals held, in substance, that comity between nations did not require dismissal of that action because the complaint therein alleges a violation of the United States anti-trust laws[12] and a long standing public policy of the United States in enforcing the anti-trust statutes enjoys an overriding public interest which is superior to other considerations.[13]

Petition for rehearing was denied.

---

[11] B4-5. The Court of Appeals did not give consideration to the fact that this action involved an alleged breach of contract for the transportation of goods by sea which might constitute a maritime contract and form the basis for admiralty jurisdiction. U.S. CONST. Art. III § 2; 28 U.S.C. § 1333. Petitioner did not challenge the District Court's jurisdiction on this ground because this defect could easily have been corrected by an amendment of the complaint whereas the District Court did not have jurisdiction over the subject matter of this action if plaintiff lacked the substantive power to sue defendant SAGA outside of France under the terms of the Franco-Swiss Treaty. The parties are now proceeding with arbitration of the issues raised in Action No. 1 in accordance with the order of the District Court.

[12] In this connection it should be noted that the meetings alleged to have formed the basis of the alleged conspiracy in restraint of trade are alleged to have taken place in London, England and elsewhere outside of the United States with an alleged solicitation of business in the United States supplemental thereto.

[13] B5. Although arriving at different and opposite results with respect to the two separate but related actions, the Court of Appeals concluded that this would not be an appropriate case for the doctrine of pendent jurisdiction "since the actions are based on different facts, are of entirely different types, and would not ordinarily be tried in one judicial proceeding."

REASONS FOR GRANTING CERTIORARI

I.

The decisions of both the District Court and the Court of Appeals have imputed to Rule 17(b) a meaning which contradicts the intended purpose of the said Rule when applied to alien nationals.

This is a case of first impression insofar as it relates to an interpretation of Rule 17(b) of the Federal Rules of Civil Procedure as applied to an alien corporation whose capacity to sue has been strictly limited by the laws under which it was organized as respects commercial transactions.

The corporate respondent's capacity to sue French nationals, in connection with disputes arising from commercial transactions between them, is limited, by the terms of the Franco-Swiss Treaty at issue, to the courts of France. This limitation upon its capacity to sue would appear to be clearly within the scope of Rule 17(b) which provides that "the capacity of a corporation to sue or be sued shall be determined by the law under which it was organized." The District Court held, and the Court of Appeals affirmed, that this provision was intended to mean only "general capacity" to sue or be sued and once this "general capacity" is found, there would be no bar to a United States District Court exercising jurisdiction over petitioner even though the limitation of the corporate respondent's capacity to sue in commercial transactions against French nationals is built into and coeval with its corporate existence.[14]

The District Court reasoned that to conclude otherwise would allow a state or nation under whose laws a corporation is organized to grant to its corporations the general capacity to sue but at the same time to immunize it from being sued anywhere except in the state or nation of its

[14] A3; B3.

incorporation.[15] This, however, was not the issue before the District Court since the matter in controversy concerned not whether petitioner SAGA had capacity to be sued or was immunized from suit in the United States but whether respondent Muller had the legal capacity to sue petitioner, or any other French national, concerning matters arising from a commercial transaction, anywhere other than in France. The authorities cited by the District Court, as affirmed by the Court of Appeals, failed to consider this issue and were concerned only with the consideration of public policy that a state of incorporation should not be allowed to authorize a corporation, which it has created, to go abroad with general capacity to sue but, at the same time, protected by a limitation upon its capacity to be sued.[16]

The hearings before the Committee on the Judiciary of the House of Representatives,[17] cited by the District Court and incorporated in the authorities cited in the opinion of the Court of Appeals, are the only existing indicators of legislative intent behind the promulgation of Rule 17(b) and are a guide to the policy which underlies the rule. However, these hearings dealt only with the issue of domestic or interstate difficulty and there is no evidence whatsoever that the Congress ever intended that this interpretation, i.e. that the capacity requirement of Rule 17(b) refers only to general capacity to sue or be sued, be applied to alien corporations. The purpose of the rule, as determined from the said legislative hearings was to prevent any sister state

[15] A3.

[16] 2 Barron & Holtzoff, Federal Practice and Procedure § 485 p. 40 (Wright ed. 1961); Hearings Before House Comm. on The Judiciary, 75th Cong., 3d Sess., ser. 17, at 20 (1938). The Court of Appeals also cited 6 Wright & Miller, Federal Practice and Procedure § 1561 at 733-34 (1971) which, in turn, relies solely upon the opinion of the District Court in the case at bar in support of the proposition relied upon, and 3A Moore, Federal Practice ¶ 17.21 at 771 (2d ed. 1970).

[17] *Op. cit. supra* note 16.

within the Federal Union from creating a corporate entity with general powers to sue while clothing it with immunity to suit in any state other than the grantor. This is not apposite the case at bar since it is nowhere claimed that either party, both of whom are alien to the United States, are clothed with general immunity to suit but rather that as between citizens of the two high contracting parties to the Franco-Swiss Treaty the capacity to bring suit is limited to a specific jurisdiction. This was the intent of the foreign governments involved in promulgating the treaty. The need to protect any United States national from suit by alien corporations which are subject to the treaty, without recourse against such alien corporations, was not before the court below and the Franco-Swiss Treaty, dealing only with French and Swiss nationals, could not give rise to that question. The purpose behind the Rule of protecting citizens of any state from suit by non-residents who are themselves immune from suit is totally lost in the decision below. The effect of the decisions of the District Court and Court of Appeals is to create in the courts of the United States a means of avoiding the restrictions of the Franco-Swiss treaty.

The treaty provision in question is not a procedural venue rule but operates directly upon the corporate respondent's capacity, i.e. substantive corporate power, providing that "the plaintiff shall be bound" to institute any suit before the "natural judges" of the defendant.

Although not strictly applicable, he limitation upon the corporate respondent's capacity to sue is analogous to the common law rule governing the capacity of administrators, executors and persons acting in similar representative capacities. Their capacities derive from appointments of courts or other authorities, to which their existence is owed and which prescribe their powers and limitations and, consequently, are subject to the inherent limitations on their

powers as defined by the laws of the creating authority and they may not act beyond the scope of that authority. See *Converse* v. *Hamilton*, 224 U.S. 243 (1912); 34 C.J.S., Executors and Administrators §1008. Similarly, any corporation created by the Republic of Switzerland is governed and limited by the applicable laws of that nation in effect at the time of incorporation which, as applied to respondent Muller herein, limits the corporate capacity to sue French nationals in matters arising out of a commercial transaction.

Here, petitioner, a French corporation, will be required to defend in the United States a suit by a Swiss corporation arising from a commercial transaction and will be subject to extensive procedures, costs and expenses incident thereto, contrary to the terms of the Franco-Swiss treaty and which is prohibited by the laws of Switzerland where respondent Muller is incorporated. Furthermore, the effect of the decisions below would open the doors of the courts of the United States to a flood of litigation between alien parties, who would thus be freed from the limitations imposed by their own sovereigns. Accordingly, this is a case of vital importance justifying a deviation from the normal appellate processes and requiring review and immediate determination at this time. See, e.g. *United States* v. *Bankers Trust Co.*, 294 U.S. 240 (1935); *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330 (1935); *Rickert Rice Mills* v. *Fontenot*, 297 U.S. 110 (1936); *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936); *Ex parte Quirin*, 317 U.S. 1 (1942); *United States* v. *United Mine Workers*, 330 U.S. 258 (1947); *Youngstown Co.* v. *Sawyer*, 343 U.S. 579 (1952).

II.

The decision of the United States Court of Appeals for the Second Circuit in confusing in that it applied a different reasoning and result to two actions between the same parties arising from the same transaction and has by so doing, in effect, nullified a valid commercial treaty between two friendly foreign powers and has granted to respondent greater rights than accorded to it by the foreign sovereign to which it owes its creation, and, conversely, abridged the rights of petitioner.

The courts of the United States recognize international treaties among friendly foreign sovereigns, including the Franco-Swiss Treaty at issue, and honor the jurisdictional limitations thereof, in accordance with general principles of international law and comity of nations. International law, including questions arising under private international law and concerning the rights of persons within the territory and dominion of one nation with respect to acts done within the territory and dominion of another, is part of the "law of the land" of the United States. The extent to which the laws of one nation shall be allowed to operate in another depends upon comity of nations, the recognition which one nation allows, within its own territory, to legislative, executive or judicial acts of another nation, having due regard to both its international duty and convenience and to the rights of its own citizens or other persons who are under the protection of its law. *Hilton* v. *Guyot*, 159 U.S. 113, 163-164 (1895). It reasonably follows that where, as here, the parties to a controversy are both legal entities created under the laws of other sovereign authorities, and no prejudice will result to citizens of the United States, the courts of the United States will give full force and effect to such foreign laws.

Consideration must also be given to the question of whether a judicial determination by a United States court

that a Swiss and/or French corporation may bring suit against the other in the courts of the United States, despite the limitation and express prohibition of the Franco-Swiss treaty, would embarrass or interfere with the Executive Branch of the United States Government in its dealings with the Republic of France and the Swiss Republic. Under the "act of state doctrine" a court of the United States may decline jurisdiction over a controversy where the nature of the controversy involves political considerations concerning the validity of public acts of a recognized foreign sovereign committed within its own territory. See, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964); *Banco Nacional de Cuba* v. *First National City Bank*, 270 F. Supp. 1004 (S.D.N.Y. 1967), rev'd 431 F.2d 394 (2d Cir. 1970), *cert. granted—judgment vacated—case remanded for reconsideration*, 400 U.S. 1019 (1971)[18] (No. 846). Here we are concerned with the validity of a treaty provision between two recognized sovereigns which deprives (or fails to empower) the nationals of each contracting state of resort to courts of the United States as a place of jurisdiction over commercial controversies between them. Respondent Muller herein seeks to avoid this jurisdictional limitation, imposed upon it by the law of the state of its incorporation, and to utilize the United States courts in a controversy which does not otherwise involve the United States. Should United States courts intercede under these circumstances? Petitioner respectfully urges that they should not.

The conduct of United States foreign relations is generally within the province of the Executive Branch of the government. See U.S. CONST. Art. II §2; *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 318-321 (1936). The Judicial Branch, while expressly given power over all cases arising under the laws of the United States and to all cases

---

[18] The Supreme Court expressed no views on the merits of the case but remanded the case "in light of the views of the Department of State expressed in its (subsequent) letter transmitted by the Solicitor General."

of admiralty and maritime jurisdiction, is cautious to avoid conflicts between it and the Executive Branch. *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964). The aforementioned letter from the Department of State to the Clerk of the United States Court of Appeals for the Second Circuit concludes that application of the rules of conflicts of laws and comity is within the province of the Judicial Branch and indicates that the Executive Branch has no objection to a United States court asserting jurisdiction over petitioner despite the Franco-Swiss treaty. However, it should be noted that in the *Sabbatino* case, *supra,* the United States filed an *amicus curiae* brief with this court supporting Cuba's "act of state" claim (376 U.S. at 411) even though the court below had relied upon two letters from the Department of State "which it took as evidence that the Executive Branch had no objection to a judicial testing of the *Cuban* decree's validity." 376 U.S. at 407. The lesson to be gained from that case and to serve as a guide herein is that the Courts must make an independent determination of the propriety of asserting jurisdiction in matters affecting the laws of foreign nations and in circumstances that may cause a conflict with the Executive Branch in our relations with foreign powers.

Although avoiding a decision on that ground, the Court of Appeals inferred that considerations of international comity would bar Action No. 1 as being a private action in contract as contrasted to the anti-trust suit which, allegedly, affects the vital interests of the United States. Thus the Court of Appeals is saying that these aliens, subject to the limitations of the treaty between their own governments, would be precluded from using the courts of the United States to litigate their private controversy over a contract, but that the doors of the courts of the United States are, inconsistently, open in an action alleged upon the basis of a statute of the United States to the exclusion of the corresponding laws of their own countries. This invites forum shopping to impose additional burdens upon the courts of the United States and may create inconsistent results arising from the alleged transaction.

III.

The subject matter of this action is so lacking in relevant contacts with the forum that to take cognizance thereof could not, in any manner, benefit any citizen of the United States and would serve no purpose other than further to burden the already congested courts of the United States with litigation among foreigners.

Separate and distinct from the issues relating to the legal capacities to the parties hereto, the courts of the United States have inherent authority, in their discretion, to decline jurisdiction in cases which should have been brought in a foreign jurisdiction, rather than in the United States, in the first instance. See *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501 (1947).

ripped of any amplification, the claim of respondent Mul er may be classified as either an action arising from a ma ime contract or the commission of a maritime tort, eith of which would fall under admiralty jurisdiction. Discretionary dismissal in admiralty cases has long been recognized and established. (See, The *Belgenland,* 114 U.S. 355 [1885]); the *Maggie Hammond,* 76 U.S. [9 Wall] 435 [1869]). This doctrine of *forum non conveniens* applies equally to suits between aliens (See, *Canada Malting Co.* v. *Paterson Steamships Ltd.,* 285 U.S. 413 [1932]; *Charter Shipping Co.* v. *Bowring Jones & Tidy Ltd.,* 281 U.S. 515 [1930]) and the court will not take cognizance of the case if justice would be well done by remitting the parties to their home forum. *Langnes Green,* 282 U.S. 531, 544 (1931); *Garis* v. *Compania Maritima San Basilio S.A.,* 261 F. Supp. 917, 919 (S.D.N.Y. 1966), aff'd 386 F. 2d 1557 (2d Cir. 1967).

This principle is supported by two general considerations; the need and desire of the parties to litigate where it is most convenient and the public interest in not congesting the courts with cases which lack relevant contacts

with the forum. Under both considerations these actions wholly lack contacts with the United States.

It is respectfully submitted that the Court of Appeals relied upon a misunderstanding of facts in arriving at its conclusion that the matter in controversy affects the public interest of the United States and that a long-standing public policy of enforcing the anti-trust statutes overrides other considerations. The primary overt act complained of, i.e. that petitioner SAGA and one Mundo Gas [19] conspired to fix prices, occurred according to plaintiff's complaint, in London, England. The location of other conferences and meetings, allegedly forming a basis of respondent Muller's claim of conspiracy, can not be ascertained from the pleadings or from the documentary evidence and other proof found in the record. The only activities in the United States alleged in connection with the conspiracy are the solicitation of certain companies for business to obtain the benefits of the alleged conspiracy after it had allegedly been arranged in England. These are basically alleged as breaches of contract but also, incidentally, "as part of the conspiracy." This U.S. aspect pertains only to damages and not to the creation or existence of the alleged conspiracy itself. Likewise, the argument advanced by respondent Muller in the courts below, that there is no comparable anti-trust statute available in France, is without foundation in and contrary to the record.[20] Accordingly, the subject matter of this

---

[19] A British corporation engaged in a shipping business similar to that of petitioner which was joined as a party defendant but not served with process in this action.

[20] Respondent Muller submitted no evidence of foreign law, of any nature whatsoever. Although the burden of proving the state of French law which it sought to assert was upon respondent Muller, petitioner SAGA submitted an affidavit of Pierre Bouloy, a French attorney, who is familiar with the Sherman Anti-Trust Act and who affirmed that there is comparable legislation in France and that such a cause of action is within the meaning of the Franco-Swiss Treaty. (See Appendix in the United States Court of Appeals, 2d Cir., at p. 210a).

action is so lacking in relevant contacts with the United States that the parties should be relegated to their nations of origin to litigate this controversy in accordance with the obligations imposed by the Franco-Swiss Treaty.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN C. MOORE
Counsel for Petitioner

C. RAYMOND NELSON
JOHN DE P. DOUW
of Counsel

APPENDIX A

Opinions of the
United States District Court
for the
Southern District of New York
314 F. Supp. 439

APPENDIX A

Opinion

United States District Court

SOUTHERN DISTRICT OF NEW YORK

69 Civ. 4222

JOSEPH MULLER CORPORATION ZURICH,

Plaintiff,

—against—

SOCIETE ANONYME DE GERANCE ET D'ARMEMENT and PETROMAR SOCIETE ANONYME,

Defendants.

69 Civ. 4223

JOSEPH MULLER CORPORATION ZURICH,

Plaintiff,

—against—

SOCIETE ANONYME DE GERANCE ET D'ARMEMENT, PETROMAR SOCIETE ANONYME, MUNDO GAS, S.A., GAZOCEAN INTERNATIONAL, S.A., GAZOCEAN FRANCE, GAZOCEAN U.S.A. et al.,

Defendants.

APPEARANCES:

RAPHAEL, SEARLES & VISCHI, New York City, for plaintiff; Benjamin Gassman, New York City, of counsel.

HAIGHT, GARDNER, POOR & HAVENS, New York City, for defendant Societe Anonyme De Gerance Et D'Armement; John C. Moore and C. Raymond Nelson, New York City, of counsel.

Opinion

MACMAHON, *District Judge.*

Defendant Societe Anonyme De Gerance Et D'Armement moves, pursuant to Rule 12(b), Fed. R. Civ. P., to dismiss the complaints in two separate but related actions. Alternatively, defendant moves to stay the first action pending arbitration.

Plaintiff is a corporation organized under the laws of Switzerland with its principal place of business in Zurich. The moving defendant is a corporation organized under the laws of France with its principal place of business in Paris.

In the first of the two actions, plaintiff claims defendant breached a written charter party agreement with plaintiff to transport by ship a chemical product, vinyl chloride monomer (VCM) from the United States to Europe. Plaintiff also claims that it exercised an irrevocable option which had been granted by defendant to extend the charter party agreement under the same terms and conditions as the original contract and that defendant breached this agreement by refusing to transport and deliver additional VCM.

In the second action, plaintiff claims defendant violated the federal antitrust statutes by monopolizing the transportation of VCM and conspiring to fix transportation charges.

Defendant's motions to dismiss the complaints in both actions on the ground of lack of subject matter jurisdiction can conveniently be considered together, since they raise the same question: plaintiff's legal capacity to sue defendant in the United States. Defendant contends that the Swiss laws under which plaintiff was organized prohibit plaintiff from suing defendant anywhere except in France.

Specifically, defendant relies on a Convention on Jurisdiction and Enforcement of Judgments in Civil Matters entered into by France and Switzerland in 1869. This treaty provides in substance that in all disputes of a civil

or commercial nature between French and Swiss nationals, the plaintiff is required to institute the action in the courts of the nation of the defendant.

The Federal Rules of Civil Procedure provide that "the capacity of a corporation to sue or be sued in a federal court shall be determined by the law under which it was organized." Fed. R. Civ. P. 17(b).

At first glance, Rule 17 would appear to allow the state or nation under whose laws a corporation is organized to grant the corporation the capacity to sue and immunize it from being sued anywhere except in the state or nation of incorporation. "Capacity to sue or be sued," however, as used in the Rule was, in order to obviate this problem of creating immunity, intended to mean the general capacity to sue or be used. The laws under which a corporation is organized either grant or withhold the capacity to sue or be sued, and the Federal Rules look to the laws under which a corporation is organized to determine if a corporation has been granted this general capacity.

Once it is determined that a corporation has the general capacity "to sue or be sued," the Rule is satisfied and the federal statutes governing venue will determine the place of trial, regardless of whether or not the laws under which the corporation was organized limit the places where a corporation can sue or be sued. See 2 Barron & Holtzoff, Federal Practice & Procedure, §485 p. 40 (Wright ed. 1961). See also Hearings Before House Comm. on the Judiciary, 75th Cong., 3d Sess., ser. 17, at 20 (1938).

Defendant does not claim that either it or plaintiff lacks the general capacity to sue or be sued. Both parties have been granted by the laws under which they are organized the capacity to sue or be sued, and the venue limitations imposed by the treaty do not incapacitate plaintiff from suing defendant, nor do they affect our subject matter jurisdiction.

Defendant raises no objection other than the treaty to the jurisdiction of this court, and defendant's motion on the ground of lack of jurisdiction is, therefore, denied.

We turn to defendant's alternative motion for a stay pending arbitration of the claims involved in the action for breach of contract.

Defendant claims that the contract provided for arbitration of disputes and that the claims involved in the first action are disputes which are within the intendment of the contract's arbitration clause.

Plaintiff does not deny that the disputes raised in the first action were of a type that the parties agreed to arbitrate. Plaintiff, in fact, sought to arbitrate these exact same disputes prior to commencing suit, and plaintiff claims defendant at that time refused. Plaintiff, even now, does not contend that the issues are not arbitrable, nor does it squarely oppose arbitration. The only opposition plaintiff raises is as to the place of arbitration.

Plaintiff wants the arbitration to proceed before the International Chamber of Commerce in New York, and defendant wants it to proceed before that same body, but in Paris.

The solution to this controversy concerning venue for the arbitration proceeding is supplied by the charter party agreement which provides that all disputes would be arbitrated in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. Article 18 of those rules provides for a Joint Arbitration Committee, set up by the International Chamber of Commerce and the American Arbitration Association, to determine disputes as to the place where the arbitration is to take place.

Since neither party disputes the validity of the charter party's arbitration clause or the arbitrability of the disputes

under that clause, the intention of the parties can best be effectuated by staying the action for breach of contract pending arbitration of the dispute as to the venue for arbitration, as well as the disputes concerning the original charter party agreement and the alleged extension of that agreement.

Accordingly, defendant's motion to dismiss both complaints is denied, and defendant's motion to stay the first action (69 Civ. 4222) pending arbitration is granted.

So Ordered.

Dated: New York, N. Y.
June 23, 1970

LLOYD F. MACMAHON
United States District Judge

Memorandum Decision

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

69 Civ. 4222

69 Civ. 4223

JOSEPH MULLER CORPORATION ZURICH,

Plaintiff,

—against—

SOCIETE ANONYME DE GERANCE ET D'ARMEMENT, et al.,

Defendants.

MACMAHON, *District Judge.*

Defendant Societe Anonyme De Gerance Et D'Armement moved to dismiss the complaints in two separate but related actions for lack of subject matter jurisdiction. The motions were denied by decision of this court on June 23, 1970. Defendant filed a notice of appeal from our decision on July 23, 1970, and the record on appeal was certified by the Clerk and transmitted to the Court of Appeals on September 1, 1970. Our interlocutory decision of June 23, 1970 was not appealable without certification by this court and permission from the Court of Appeals. 28 U.S.C. § 1292(b).

Defendant now moves to amend our order of June 23, 1970 to include certification of the following question for appeal:

> "Whether the United States District Court for the Southern District of New York has jurisdiction over the subject matter of a civil action brought by an alien corporation created under the law of Switzerland against an alien corporation domiciled in France, where the republic of Switzerland has prohibited the plaintiff to sue the defendant anywhere except in France."

The standard to follow in certifying questions for appeal is set forth in 28 U.S.C. §1292(b), which provides in pertinent part:

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order."

We held that plaintiff had the general capacity to sue defendant in this court, notwithstanding a treaty between France and Switzerland that prohibited such suit. There was no law directly in point to guide us in our decision, and we are of the opinion that our order of June 23, 1970 involves a controlling question of law as to which there is a substantial ground for difference of opinion. Therefore, without wavering from our decision on the question, we think an immediate appeal from our order may materially advance the ultimate termination of this litigation with great savings of time and expense for all parties involved.

Accordingly, defendant's motions to amend our order of June 23, 1970 to include certification of the aforementioned question for appeal is in all respects granted.

Settle order on notice within ten (10) days.

Dated: New York, N. Y.
April 27, 1971

LLOYD F. MACMAHON
United States District Judge

Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

---

69 Civ. 4222

JOSEPH MULLER CORPORATION ZURICH,

Plaintiff,

—against—

SOCIETE ANONYME DE GERANCE ET D'ARMEMENT and PETROMAR SOCIETE ANONYME,

Defendants.

---

69 Civ. 4223

JOSEPH MULLER CORPORATION ZURICH,

Plaintiff,

—against—

SOCIETE ANONYME DE GERANCE ET D'ARMEMENT, PETROMAR SOCIETE ANONYME, MUNDO GAS, S.A., GAZOCEAN INTERNATIONAL, S.A., GAZOCEAN FRANCE, GAZOCEAN U.S.A., JOHN DOE and RICHARD ROE, JOHN DOE CORPORATION and RICHARD ROE CORPORATION, the names of the defendants, JOHN DOE and RICHARD ROE, JOHN DOE and RICHARD ROE CORPORATION, being fictitious, their real names and identities presently unknown to the plaintiff,

Defendants.

Defendant, Societe Anonyme De Gerance Et D'Armement, having moved this court for an order, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, to dismiss the complaints in the two separate but related actions

above named upon the ground that this court lacks jurisdiction over the subject matter thereof and, in the alternative, to stay the first action above named pending arbitration, and the said motion having come on for a hearing before this court on the 14th day of April, 1970, and the court having heard all arguments of counsel thereon and after due deliberation the court having filed its memorandum, opinion and order denying defendant's said motions to dismiss both complaints and granting defendant's alternative motion to stay the first action above named (69 Civ. 4222) pending arbitration, on June 23, 1970, and said defendant having moved this court to amend the memorandum decision and order of this court dated June 23, 1970 to include certification of the issue raised therein to the United States Court of Appeals for the Second Circuit pursuant to Section 1292(b) of Title 28 U.S. Code.

Now, upon reading and filing the orders to show cause in each of the two separate but related actions above named, dated April 9, 1971, and the affidavits of John C. Moore, verified the 6th day of April, 1971 annexed thereto and in support thereof, and the affidavit of Benjamin Gassman, verified the 12th day of April, 1971, in opposition thereto, and the motions of the said defendant dated December 15, 1969 for an order, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, dismissing the complaint in the said actions on the grounds that this court lacks jurisdiction over the subject matter thereof and for alternative relief, and upon all the papers and exhibits submitted in support thereof and in opposition thereto, and due deliberation having been had thereon and the court having filed its memorandum opinion dated April 27, 1971 granting, in all respects, the said defendant's motions to amend the memorandum decision and order of this court dated June 23, 1970.

Now, upon motion of Haight, Gardner, Poor & Havens, attorneys for defendant Societe Anonyme De Gerance Et D'Armement, it is hereby

ORDERED, that the motion of defendant Societe Anonyme De Gerance Et D'Armement to amend the memorandum decision and order of this court dated June 23, 1970, to include certification of the issues raised therein to the Court of Appeals pursuant to Section 1292(b) of Title 28 U.S. Code, be and the same hereby is granted, and it is further

ORDERED, that the memorandum decision and order of this court dated June 23, 1970 be and the same hereby is amended to the extent of certifying the following question for appeal:

> "Whether the United States District Court for the Southern District of New York has jurisdiction over the subject matter of a civil action brought by an alien corporation created under the law of Switzerland against an alien corporation domiciled in France, where the Republic of Switzerland has prohibited the plaintiff to sue the defendant anywhere except France"

and it is further

ORDERED, that the defendant Societe Anonyme De Gerance Et D'Armement, be granted leave to apply for the United States Court of Appeals for the Second Circuit within ten (10) days from the entry of this order for permission to appeal from so much of this order as denies defendant's motion to dismiss the complaint upon the ground that this court lacks jurisdiction over the subject matter thereof on the basis of the issue certified herein.

Dated: New York, New York
May 18, 1971

LLOYD F. MACMAHON
U. S. D. J.

[redacted]

APPENDIX B

Order Granting Leave to Appeal

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of June, one thousand nine hundred and seventy-one.

JOSEPH MULLER CORPORATION ZURICH,
Plaintiff-Appellee,

v.

SOCIETE ANONYME DE GERANCE ET D'ARMEMENT
Defendant-Appellant,

PETROMAR SOCIETE ANONYME, MUNDO GAS, S.A., et al.,
Defendants.

It is hereby ordered that the motion made herein by counsel for the petitioner for leave to appeal pursuant to 28 United States Code §1292(b) be and it hereby is granted.

It is further ordered that the clerk transmit a copy of the motion and of the briefs, when filed, to the Legal Adviser of the Department of State with a letter indicating that the court would welcome the views of the Department.

HENRY J. FRIENDLY, U.S.C.J.

PAUL R. HAYS, U.S.C.J.

JAMES L. OAKES U.S.C.J.

Opinion

Appeal by SAGA, a Swiss corporation, from a ruling upholding the jurisdiction of the United States District Court over two separate suits (1) involving a breach of contract and (2) a treble damage action under the Sherman Act; both of which were filed by Joseph Muller Corporation Zurich, despite a French-Swiss treaty prohibiting Muller from suing SAGA anywhere, except in France.

Affirmed as to the Sherman Act case and reversed on the contract action.

RAPHAEL, SEARLES & VISCHI (Benjamin Gassman and Sidney O. Raphael of New York, of Counsel), *for Plaintiff-Appellee.*

HAIGHT, GARDNER, POOR & HAVENS, 80 Broad Street, New York (John C. Moore, C. Raymond Nelson and John del'. Douw, of Counsel), *for Defendant-Appellee.*

PER CURIAM:

Joseph Muller Corporation Zurich, a Swiss corporation, brought two separate but related actions in the District Court for the Southern District of New York against Societe Anonyme de Gerance et D'Armement (SAGA), a French corporation, and other defendants. In the first action, Joseph Muller charged SAGA and another defendant with breach of a charter party agreement to transport certain chemical commodities from the United States to Europe and failure to honor Joseph Muller's exercise of an allegedly irrevocable option to extend the charter party agreement. In the second action, Joseph Muller charged SAGA and other defendants with conspiring to fix prices

for and with the monopolization of the transportation of various chemical commodities. On motions by SAGA to dismiss both actions for lack of subject matter jurisdiction because of a Franco-Swiss treaty requiring that suits between nationals of France and Switzerland be brought in the courts of the defendant's nation, the District Court deemed the issue in the case of both suits to be "plaintiff's legal capacity to sue defendant in the United States." Treating the issue as controlled by Rule 17(b), F.R. Civ. P., which provides that "[t]he capacity of a corporation to sue or be sued shall be determined by the law under which it was organized," it held that the Republic of Switzerland had granted Joseph Muller the general capacity to sue or be sued and that therefore the suits could be prosecuted in federal court consistent with Rule 17(b). After appropriate certification by the District Court, this Court granted leave to appeal under 28 U.S.C. §1292(b), and the two appeals were consolidated.

We agree with the District Court's conclusion that Rule 17(b) deals only with the general capacity of a corporation to sue or be sued, see 6 Wright & Miller, Federal Practice and Procedure § 1561, at 733-34 (1971), 3A Moore, Federal Practice ¶17.21 at 771 (2d ed. 1970), and that since both Joseph Muller and SAGA have such general capacity under the laws of the nations to which they owe their existence, the Franco-Swiss treaty would not constitute a bar to either of these suits if Rule 17(b) were the sole problem in this case. The question remains, however, whether other considerations including comity due to the Franco-Swiss treaty, see *Hilton* v. *Guyot*, 159 U.S. 113, 163-64 (1895); *United States* v. *First National City Bank*, 396 F. 2d 897, 901 (1968), require dismissal of these actions. We have concluded that dismissal is required with reference to the contract suit but not as to the one filed under the Sherman Act.

In the latter case, a long standing public policy of the United States is involved which enjoys an overriding public interest and violations of which carry penal sanctions. In view of this and regardless of whether the Franco-Swiss Treaty covers such an action, we are of the view that comity between nations does not require dismissal. See *First National City Bank, supra,* at 902-03; Restatement (Second) of Foreign Relations Law of the United States §40, at 123, Reporters' Notes discussing *Holophane Co.* v. *United States,* 352 U.S. 903 (1956). In addition to the usual considerations, the appellants here all have offices in the United States and are carrying on both foreign and domestic trade and commerce in the commodity involved within its borders. Furthermore, the appellant, SAGA, has a wholly owned subsidiary, SAGA, Inc., a New York corporation, which carries on a large business and has many employees in the Southern District; and the appellant, Gazocean International, S.A., and Gazocean France, have a jointly owned subsidiary, Gazocean USA, a New York corporation, that is likewise engaged in business in the United States.

Finally the overt acts, conferences, meetings, etc. involved in the anti-trust claim occurred largely within the United States and the trade and commerce in the commodity involved originated in the United States and was to be shipped from it to other countries.

While considerations of international comity would suggest that—given the policy expressed in the Franco-Swiss treaty—United States courts should decline to exercise jurisdiction over a purely private action such as the contract suit here at issue, particularly when the contracts were entered into and were to be performed largely outside the United States, we need not rest our decision on that ground. The pleadings in that suit fail to reveal any

basis of federal jurisdiction. Joseph Muller's complaint asserted jurisdiction based upon diversity of citizenship. But as the pleadings clearly show, all parties are aliens, and neither the constitutional nor statutory grants of jurisdiction include such a suit. See U.S. Const. Art. III, §2, cl. 1, subcl. 8; 28 U.S.C. §1332(2).[1] Although we have given consideration to the doctrine of pendent jurisdiction, see *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), we have concluded that this would not be an appropriate case for doing so, since the actions are based on different facts, are of entirely different types, and would not ordinarily be tried in one judicial proceeding.

In view of these considerations, the judgment with reference to Case No. 35332—*Joseph Muller* v. *Societe Anonyme de Gerance et D'Armement and Petromar*—is reversed, and Case No. 35333—*Joseph Muller* v. *Societe Anonyme de Gerance et D'Armement and Petromar Societe et al.* is affirmed.

---

[1] Also see *Hodgson and Thompson* v. *Bower Bank*, 5 Cranch 303 (1809), where Marshall, *C.J.*, held that although the plaintiff be described in the proceedings as alien, yet defendant must be expressly alleged to be a citizen of some one of the United States, otherwise the courts of the United States have no jurisdiction in the case; *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 390, Footnote 1 (1959) (Brennan, *J.*, dissenting); and *National Insurance Company* v. *Tidewater Company*, 337 U.S. 582, 635 (1949) (Vinson, *C.J.*, dissenting); Chas. Alan Wright, Law of Federal Courts, 2d Edition, 18 and 1 Moore's Federal Practice 701.51 (2nd Edition).

Order Denying Petition for Rehearing

35332

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

JOSEPH MULLER CORP. ZURICH,
Plaintiff-Appellee,

v.

SOCIETE ANONYME DE GERANCE ET D'ARMEMENT, et al.,
Defendants.

SOCIETE ANONYME DE GERANCE ET D'ARMEMENT,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby its denied.

December 6, 1971

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAR 30 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1971.

No. 71-1126.

SOCIETE ANONYME DE GERANCE ET D'ARMEMENT,

Petitioner,

v.

JOSEPH MULLER CORPORATION ZURICH,

Respondent.

BRIEF IN OPPOSITION.

SIDNEY O. RAPHAEL,
Counsel for Respondent,
770 Lexington Avenue,
New York, N. Y. 10021
212 832-7700.

BENJAMIN GASSMAN,
Of Counsel.

Table of Contents.

Page

Questions Presented 1

ARGUMENT:

POINT I. Petitioner has the burden of proof, but failed to sustain it in its petition 2

POINT II. There is no inconsistency in the decision of the Court of Appeals which sustained the complaint in the anti-trust action while at the same time it dismissed the complaint in the contract action 3

POINT III. The respondent has the capacity to sue in the U. S. District Court, Southern District of New York 3

POINT IV. The anti-trust action is not covered by the treaty between Switzerland and France 7

POINT V. Public policy does not require the United States to follow the provisions of the Franco-Swiss Treaty, to which it is not a party, particularly when that treaty runs counter to the public policy of the people of the United States 14

CONCLUSION. For the foregoing reasons, the petition for certiorari should be denied 21

TABLE OF CITATIONS.

	Page
American Tobacco Co. v. United States, 328 U. S. 781	11
Arthur v. Kraft-Phenix Cheese Corporation, 26 F. Supp. 824, 825	15
Brenner v. Texas Company, 140 F. Supp. 240, 242	14
Carolene Products Co. v. U. S., 323 U. S. 18	5
County Court of Wayne County, W. Va., v. Louisa, & Fort Gay Bridge Co., Inc., 46 F. Supp. 1, 3	20
Davidson v. Kansas City Star Company, 202 F. Supp. 613, 617	14
Dennison Mattress Factory v. Spring-Air Company, 308 F. 2d 403, 407	9, 19
Epstein v. Risor, 296 F. Supp. 214, 216	5
Federal Trade Commission v. Cement Institute, 333 U. S. 683	12
Hellrung v. LaFayette Loan & Trust Co., 102 F. Supp. 822, 823	5
Higgins v. Carr Bros., 317 U. S. 572, 574	2
John W. Johnson, Inc., v. Atlantic States Construction Company, 276 F. Supp. 379	6
John Wright Associates, Inc., v. Ulrich, 203 F. Supp. 744, 750	11
Moore v. Mitchell, 281 U. S. 18	6
N. W. Lyles, Inc., v. Atlantic States Construction Company, 276 F. Supp. 379	6

Page

Pacific Seafarers, Inc., v. Pacific Far East Line, Inc., 404 F. 2d 804, 817 16

Paramount Famous Lasky Corporation v. U. S., 282 U. S. 30, 42 14

Radovich v. National Football League, 352 U. S. 445, 454 14

Ruddy Brook Clothes, Inc., v. British Foreign & Marine Insurance Co., 103 F. Supp. 290, 291 .. 14, 15

Shotkin v. General Electric Co., 171 F. 2d 236, 239 .. 14

Standard Oil Company of California v. Moore, 251 F. 2d 188, 211 12

Thomsen v. United Castle Mail S. S. Co., 166 Fed. 251 17

Thomsen v. United Castle Mail S. S. Co., 243 U. S. 66 18

Timken Roller Bearing Co. v. U. S., 341 U. S. 593, 598 9

U. S. v. Aluminum Co. of America, 148 Fed. 2d 416, 443 19

U. S. v. Cooper Corporation, 31 F. Supp. 848, 850 12

U. S. v. Detroit Sheet Metal Association, 116 F. Supp. 81, 86 9

U. S. v. General Electric Corporation, 40 F. Supp. 627 10

U. S. v. Hamburg American-Amerikanische-Packet-Fahrtractien-Gesselschaft, 200 F. 806 16

U. S. v. Kissel, 218 U. S. 601 10

U. S. v. L. D. Caulk Company, 126 F. Supp. 693, 704 11

Page

U. S. v. Massanate, 316 U. S. 265, 274 9

U. S. v. National Lead Co., 63 F. Supp. 513, 523 9

U. S. v. New Wrinkle, Inc., 342 U. S. 371, 377 9

U. S. v. Pacific & A. R. Navigation Co., 228 U. S. 87 18

U. S. v. Paramount Pictures, 334 U. S. 131 9

U. S. v. Peoples Trust & Savings Co., 97 F. 2d 771 6

U. S. v. Procter & Gamble Company, 180 F. Supp. 195, 203 12

U. S. v. Swift & Co., 52 F. Supp. 476, 479 9

U. S. v. Waltham Watch Co., 47 F. Supp. 524, 531, 532 ..... 9, 10

U. S. v. The Watchmakers of Switzerland Information Center, 133 F. Supp. 40 16

U. S. v. Zellerbach Corporation, 141 F. Supp. 118, 127 11

Waterman v. Canal Louisiana Trust Co., 215 U. S. 33 ..... 5, 6

RULES CITED.

Rule 17 (b), Federal Rules of Civil Procedure 4, 7

2 Barron & Holtzoff Federal Practice & Procedure (Vol. 2), §485, page 40 ..... 4, 6

Wright and Miller Federal Practice & Procedure (1971), Vol. 6, §1561, page 733 ..... 4, 7

LEGISLATIVE HEARINGS.

Page

Committee on Judiciary, U. S. House of Representatives, 75th Congress, Third Session, Serial 17, 1938, page 20 5

Cleveland Institute on Federal Rules (1938), page 258 7

FEDERAL STATUTES.

Title 15 U. S. C. A., §1 8

Title 15 U. S. C. A., §12 12

Title 15, U. S. C. A., §15 13

IN THE

Supreme Court of the United States

October Term 1971.

No. 71-1126.

SOCIETE ANONYME DE GERANCE ET D'ARMEMENT,

Petitioner,

v.

JOSEPH MULLER CORPORATION ZURICH,

Respondent.

BRIEF IN OPPOSITION.

Questions Presented.

1. Where the laws of the state or country in which a corporation is organized give to such corporation "capacity to sue or be sued" may such corporation sue or be sued in any jurisdiction in which process is served upon the defendant?

2. Once such corporation has the "capacity to sue or be sued," did the U. S. District Court acquire jurisdiction of the subject matter notwithstanding the provisions of the 1869 treaty between France and Switzerland?

3. Having acquired jurisdiction of the person of the petitioner, does the U. S. District Court have jurisdiction of the subject matter, particularly that which is in-

volved in an anti-trust action, where there are no comparable anti-trust statutes either in France or in Switzerland?

ARGUMENT.

This case does not involve any conflict with the decisions of this court. Nor is there any conflict among the circuits. Neither is there any constitutional question involved. Nor is there any denial of equal protection.

The question presented to the court below was a simple one, to wit; where the petitioner was "operating and doing business either in its own name or under the name of an agency and/or subsidiary and/or direct representatives, in the City of New York in the United States of America" (4a, 22a) (which allegations in the complaint must be deemed admitted for the purpose of the motion to dismiss), and service of the summons and complaint was made upon the petitioner within the City and State of New York, did the District Court acquire jurisdiction of the petitioner as well as of the subject matter of this litigation?

As we shall point out, the treaty between France and Switzerland on which petitioner relies does not deprive the District Court of jurisdiction of the subject matter.

POINT I.

Petitioner has the burden of proof, but failed to sustain it in its petition.

It is elementary law that on an application for a writ of certiorari to this court, the petitioner has the burden of proof to show error in the court below (*Higgins v. Carr Bros.*, 317 U. S. 572, 574). Respondent respectfully sub-

mits that such burden was not sustained by the petitioner.

POINT II.

There is no inconsistency in the decision of the Court of Appeals which sustained the complaint in the anti-trust action while at the same time it dismissed the complaint in the contract action.

The Court of Appeals, in dismissing the complaint in the breach of contract action, stated that "United States Courts should decline to exercise jurisdiction over a purely private action such as the contract suit here in issue." Undoubtedly the Court of Appeals was influenced by the fact that the District Judge (MacMahon, J.) stated in his opinion that the issues involved in the contract action were subject to arbitration between the parties and that, therefore, staying the trial of the contract action pending arbitration, was not sufficient, and that in view of the fact that the contract action was being arbitrated, that same should be dismissed.

POINT III.

The respondent has the capacity to sue in the U. S. District Court, Southern District of New York.

Petitioner contends that the treaty between Switzerland and France provides in substance that any civil or commercial action between French and Swiss Nationals is required to be instituted in the country of the defendant. This, however, does not in any way rule out respondent's right to bring and to prosecute this action in the United States Courts.

Rule 17(b) of the Federal Rules of Civil Procedure provides that: "the capacity of a corporation to sue or be sued shall be determined by the law under which it was organized." Rule 17(b) deals merely with the "capacity to sue or to be sued." It does not deal with the place where the action is to be commenced or prosecuted. As *Barron & Holtzoff* pointed out in Volume II of their work on Federal Practice and Procedure (1961), §485 (p. 40):

> "It is generally recognized that this provision relates only to the capacity to sue and be sued and not to the place of suit. Consequently, if a corporation can sue, it can be sued anywhere."

Similarly, *Wright and Miller Federal Practice and Procedure* (1971), Volume 6, §1561, page 733, re-affirms the rule enunciated in *Barron & Holtzoff* (*supra*), stating:

> "Rule 17(b) does not require a Federal Court to honor a State practice of chartering corporations so that they will be subject to suit only in its own courts. It is generally recognized that the second sentence of Rule 17(b) relates only to following state law with regard to corporate capacity to sue and be sued, *and not to the place of suit.* Consequently, if a corporation is empowered to sue or be sued in its state of organization, then it can sue or be sued in any Federal Court." (Italics supplied.)

Petitioner does not contend that, under the Swiss Law which created Muller, Muller has no capacity "to sue or to be sued," nor that, under the French Law which created Saga, Saga has no capacity "to sue or to be sued." It must therefore be assumed that such capacity was granted to both of them and, under the circumstances, this action was properly brought in the U. S. District Court.

> "The capacity to sue is one thing and how, when, and *where* to sue, is another, and we must always bear in mind that we are dealing only with capacity, technical capacity. This rule simply means this, that if under the law of Delaware, a corporation is organized and under the law of its domicile, Delaware, it has the capacity to sue or be sued, then it can be sued or sue anywhere". (*Hearings Before Committee on Judiciary, U. S. House of Representatives*, 75 Cong. Third Session, Serial 17, 1938, p. 20).

> "Statements made by legislators in debate can be a part of the legislative history which guides courts in statutory construction" (*Epstein v. Risor* [1969], 296 F. Supp. 214, 216, affirmed [1970] in 421 F. 2d 930).

This court in *Carolene Products Co. v. United States* (323 U. S. 18 at p. 28) (1944), held that the Supreme Court, in determining legislative intent, would take judicial notice of the reports of the House and Senate committees.

This would also apply to hearings held before legislative committees.

If petitioner's contention were to be sustained, then a foreign country creating a corporation, or any of the states in the United States creating a corporation, would have the right to immunize its corporation against being sued in any court other than in the court or state of its creation. This is an undue restriction on the jurisdiction of the Federal Courts of this country and, as was held in *Hellrung v. LaFayette Loan & Trust Co.* (1951), 102 Fed. Supp. 822 at page 823:

> "A State cannot by statute restrict the power of the Federal Courts to hear and determine suits within their concurrent jurisdictions. (*Waterman*

> *v. Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33, 43, 44; *United States v. People's Trust & Savings Co.*, 97 F. 2d 771) • • •. The authority of these cases cannot be weakened or avoided by the observation that they were decided prior to the adoption of Rule 17(b) since that rule apparently was merely declarative of existing law. (Cf. *Moore v. Mitchell, et al.* [1930], 281 U. S. 18, 23.)"

It cannot be said that where the Federal Courts have jurisdiction, that a state or a foreign country can insulate a corporation formed under its laws against lawsuits in any jurisdiction other than the particular state or country of incorporation.

Such a restriction, whether contained in the statutes of a state, or a foreign country, or even if contained in a treaty between two foreign nations, would be contrary to the public policy of the United States, particularly when it refers to interstate or foreign commerce.

The rule enunciated in *2 Barron & Holtzoff* (above referred to) was cited with approval in *John W. Johnson, Inc., and F. W. Lyles, Inc., v. Atlantic States Construction Company* (1967), 276 F. Supp. 379, wherein the court at page 385 said:

> "It appears clear that the second sentence of rule 17(b) 'relates to the capacity to sue and be sued and not to the place of suit.' Consequently, if a corporation can sue, it can be sued anywhere. (*2 Barron & Holtzoff*, Federal Practice & Procedure, ¶485, p. 40), citing testimony given during hearings before the Committee on Judiciary of the United States House of Representatives and other supporting historical references.
>
> "Some objectors asserted that • • • [the provision concerning the capacity of a corporation to sue and be sued] would give the state of incorpora-

> tion the right of limiting the suability of a corporation in all other states. We felt quite clearly that this was a misuse of the term 'capacity,' that capacity dealt merely with suability, *and that once a corporation was endowed with the general character of the corporate entity, such as we know it, that then it could not be provided that it was not subject to the liabilities of a corporation* • • •." (*Proceedings of Cleveland Institute on Federal Rules*, 1938, p. 258.) (Italics supplied.)

The Court of Appeals properly agreed with the District Court's conclusions when it stated that "Rule 17(b) deals entirely with the general capacity of a corporation to sue or be sued (citing 6 Wright and Miller, Federal Practice and Procedure, paragraph 1561, at 733-34 [1971], and 3A Moore, Federal Practice, paragraph 17.21 at 771 [2d ed. 1970]) and that since both Joseph Muller and Saga have such a general capacity under the laws of the nations to which they owe their existence, the Franco-Swiss treaty would not constitute a bar to either of these suits if Rule 17(b) were the sole problem in this case."

POINT IV.

The anti-trust action is not covered by the treaty between Switzerland and France.

Petitioner stresses the fact that under the treaty between France and Switzerland the plaintiff had to institute his action before the natural judges of the defendant.

A reading of the language in the treaty is convincing of the fact that it does not cover nor has it any reference to the anti-trust action involved herein. The treaty,

as it states, concerns itself with civil actions based on contract. This is pointed out by Dean Paul Chauveau at 73A, wherein he states:

> "If nonetheless, the purpose of the action *is to enforce a contract* agreed to by the defendant in a place situated either in France or in Switzerland, outside the jurisdiction of the said natural Judges, it may be taken before the Judge of the place where the contract has been concluded, in the event the parties are residing therein at the time the proceedings are to be instituted." (Italics supplied.)

Again, continuing in his affidavit, Dean Chauveau states:

> "Undoubtedly the convention applies to any *dispute concerning a contract* between two parties, since this type of dispute is expressly mentioned in the second paragraph of Article 1" (74A). (Italics supplied.)

The anti-trust action is a statutory action. It is not an action based on contract but is based on a conspiracy in restraint of commercial trade, both interstate and foreign. It is therefore not an action covered by the treaty provisions, but is an action under the Clayton Act, not precluded by the treaty.

Title 15 U. S. C. A., paragraph 1, provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign countries, or with foreign nations, is declared to be illegal * * * every person who shall make any contract or engage in any combination or conspiracy declared by Sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding Fifty Thousand Dollars, or by

imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court."

It has been established by a long line of decisions that price fixing in commerce, whether it is reasonable or unreasonable, is *per se* a violation of Clayton Act as restraint of commerce (*U. S. v. New Wrinkle, Inc.*, 342 U. S. 371, 377; *U. S. v. Paramount Pictures*, 334 U. S. 131; *U. S. v. Massanate*, 316 U. S. 265, 274; *U. S. v. Swift & Co.*, 52 F. Supp. 476, 479; *U. S. v. Waltham Watch Co.*, 47 F. Supp. 524, 531; *U. S. v. Detroit Sheet Metal Association*, 116 F. Supp. 81, 86).

No citation of authority is any longer necessary to support the proposition that a combination of competitors, which by agreement "* * * suppresses all competition among the members of the combination, offends the Sherman Act" (*U. S. v. National Lead Co.*, 63 Fed. Supp. 513, 523).

The complaint and the opposing affidavits clearly show that the conspiracy entered into between the petitioner and the other defendants had for its purpose the suppression of competition among them.

The effect of the Sherman Anti-Trust Act and the Clayton Act was to make those contracts in restraint of trade, which were void at common law, unlawful in a positive sense and created a civil liability for damages in favor of the injured party (*Dennison Mattress Factory v. Spring Air Company*, 308 Fed. 2d 403, 407; *Timken Roller Bearing Co. v. U. S.*, 341 U. S. 593, 598).

This difference between an action based on contract and one based on a conspiracy in restraint of trade has been repeatedly pointed out by our courts.

In *U. S. v. Kissel* (1910), 218 U. S. 601, the Supreme Court at page 608 said:

> "A conspiracy in restraint of trade is different from and more than a contract in restraint of trade. A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself."

In *U. S. v. Waltham Watch Co.* (1942), 47 Fed. 524, the court at page 532 said:

> "A conspiracy in restraint of trade is different from a contract in restraint of trade. 'A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself' (*U. S. v. Kissel*, 218 U. S. 601). No final agreement is necessary for the formation of a conspiracy. It may be shown by concert of action among the conspirators, all working together for a common purpose."

In *U. S. v. General Electric Co.* (1941), 40 Fed. Supp. 627, the court at page 630 said:

> "A contract in restraint of interstate and foreign commerce is condemned in Section 1 of the Sherman Anti-Trust Act. So is a conspiracy in restraint of such trade. The contract is not necessarily the same as the conspiracy. *In United States v. Kissel*, 218 U. S. 601, 608, the Court said: 'A conspiracy in restraint of trade is different from and more than a contract in restraint of trade. A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself.'"

In *John Wright Associates, Inc., v. Ullrich* (1962), 203 Fed. Supp. 744, the court at page 750 said:

> "If the end sought is monopoly, it is of no consequence that the means were lawful or unlawful. No formal agreement is necessary to establish a conspiracy and business behavior is admissible as circumstantial evidence from which an illegal agreement may be inferred."

In *American Tobacco Co. v. United States* (1946), 328 U. S. 781, the court at page 809 said:

> "No formal agreement is necessary to establish an unlawful conspiracy."

In *U. S. v. L. D. Caulk Company* (1954), 126 F. Supp. 693, the court at page 704 said:

> "So also many authorities are cited to the effect that there need be no formal written agreement or contract to constitute a Sherman Act violation; that is enough that a concert of action is contemplated and that the defendants conformed to the arrangement! * * * As to this principle I entertain no measure of dissent."

In *U. S. v. Zellerbach Corporation* (1956), 141 F. Supp. 118, the court at page 127 said:

> "The combinations which the Sherman Act prohibits are not limited to enforceable contracts in writing."

In *Standard Oil Company of California v. Moore* (1958), 251 Fed. Rep. 2d 188, the court at page 211 said:

> "No express agreement is necessary to constitute an unlawful combination or conspiracy (*American Tobacco Co. v. U. S.*, 328 U. S. 781, 809). It is sufficient if persons with knowledge that concerted action was contemplated and invited, 'give adherence to and then participate in a scheme' (*Federal Trade Commission v. Cement Institute*, 333 U. S. 683)."

Sections 1 to 7 of the Clayton Act are primarily criminal in their nature.

In *U. S. v. Procter and Gamble Company* (1959), 180 F. Supp. 195, the court at page 203 said:

> "* * * The Sherman Act is primarily a criminal statute, its first three sections declaring certain acts illegal and prescribing punishment therefor."

In *U. S. v. Cooper Corporation* (1940), 31 F. Supp. 848 (aff'd in 114 F. 2d 413, certiorari denied in 312 U. S. 600), the court at page 850 said:

> "The courts have pointed out that a violation of the (Sherman) Act was a statutory offense, of a penal nature, in which the right is given to an individual to recover for injury to his business or property with three-fold damage."

The word "person" or "persons" as contained in Chapter 1, Title 15 U. S. C. A., is defined in Section 12 thereof as follows:

> "The word 'person' or 'persons' whenever used in this act shall be deemed to include corporations or associations existing under or authorized by the laws of either the United States, the laws of any

> of the territories, the laws of any State or the laws of any foreign country."

Accordingly the respondent, though a corporation organized under the laws of Switzerland, is one of the "persons" authorized to commence an action under the Clayton Act.

As to where such suit may be brought, Title 15 U. S. C. A. Chapter 15 ¶15 provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the Anti-Trust Laws, may sue therefor in any District Court of the United States in the district in which the defendant resides, or is found, or has an agent, without respect to the amount in controversy and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

We respectfully submit that the respondent has met each of the conditions contained in paragraph 15 above quoted, in that it is (1) a person injured in its business or property; (2) by reason of anything forbidden in the anti-trust law; and (3) that it therefore has the right to bring the action "in any District Court of the United States in the district in which the defendant resides, or is found, or has an agent."

It is undisputed that the summons and complaint herein was served on the petitioner in the City of New York.

POINT V.

Public policy does not require the United States to follow the provisions of the Franco-Swiss Treaty, to which it is not a party, particularly when that treaty runs counter to the public policy of the people of the United States.

On page 16 *et seq.* of its petition, petitioner argues that our Federal Courts must follow blindly the provisions of the Franco-Swiss Treaty (to which the United States was not a party) and to deny access to our Federal Courts of cases which vitally affect interstate and foreign trade of citizens of the United States.

On page 16 of its petition, petitioner states:

> "Consideration must also be given to the question of whether a judicial determination by a United States Court that a Swiss and/or French corporation may bring suit against the other in the Courts of the United States, despite the limitation and express prohibition of the Franco-Swiss Treaty, *would embarrass or interfere with the executive branch of the United States Government in its dealings with the Republic of France and this Swiss Republic.*" (Italics supplied.)

In advancing this argument petitioner completely overlooks the fact that the anti-trust statutes of the United States were intended for the protection of the American public as well as the individual litigant involved (*Radovich v. National Football League* [1957], 352 U. S. 445, 454; *Paramount Famous Lasky Corporation v. United States*, 282 U. S. 30, 42; *Shotkin v. General Electric Co.* [1948], 171 F. Rep. 2d 236, 239; *Brenner v. Texas Company* [1956], 140 F. Supp. 240, 242; *Davidson v. Kansas City Star Company* [1962], 202 F. Supp. 613, 617; *Ruddy*

Brook Clothes, Inc., v. British Foreign & Marine Ins. Co. [1951], 103 F. Supp. 290, 291, aff'd 195 F. 2d 86; *Arthur v. Kraft-Phenix Cheese Corporation* [1938], 26 F. Supp. 824, 825).

That being the intent of the law, a party charged with violation of that law should not be permitted to escape liability because of a foreign treaty which is inimical to the interests of the American public and makes it possible for a wrongdoer to escape liability for a wrong done to the public.

If petitioner were to be successful in dismissing the complaint, there would be no way for the respondent to obtain redress for itself or the public, for neither France nor Switzerland have any statute comparable to the Clayton Act.

The complaint in this action alleges (and, as pointed out, *ante*, those allegations must be deemed admitted for the purpose of this application that respondent was in the business of purchasing from the Ethyl Corporation in Virginia, Louisiana and Texas a liquid known as V. C. M. for transportation to its customers in Eurpoe and that the original charter agreement between respondent and the defendants, Saga and Petromar, required the said defendants to furnish the necessary means of loading, transportation, tankers and facilities for that purpose, as well as unloading facilities in Eurpoe (5A, 6A, 26A, 27A).

Accordingly, the contract involved and affected American and foreign commerce and shipping, and the actions of the defendants in the anti-trust case involved restraint of trade or commerce with foreign nations, thus definitely affecting the public interest of the United States. The only redress respondent has is under the Clayton Act,

there being no comparable anti-trust act either in Switzerland or in France.

> "It is plain that where American foreign commerce is affected, foreigners may be held under our Anti-trust laws for restraints thereon" (*Pacific Seafarers, Inc., v. Pacific Far East Line, Inc.* [1968], 404 F. 2d 804, 817).

In *United States v. The Watchmakers of Switzerland Information Center,* 133 F. Supp. 40 (motion for reargument denied in 134 F. Supp. 710), the court at page 46 said:

> "Coming to the question of whether a trial in this forum would subject the defendants to unfair inconvenience, it appears that there is no forum more convenient than this. As in *Latimer v. S/A Industries Reunidas F. Matarazzo, supra* (175 Fed. 2d 194), defendant's home office is in a foreign country. Further, in this case, the relief sought could not be obtained there. The laws alleged to be violated are those of this forum. Many of the acts upon which the claim is based occurred here, although probably more occurred in Switzerland."

Thus the present cases come clearly within the decision of *United States v. Hamburg-American-Amerikanische-Packet-Fahrtactien-Gesellschaft* (1911), 200 Fed. Rep. 806, where the court carefully considered the question of international complications, and at page 806 said:

> "It may be accepted without discussion that transportation of passengers between this country and Europe forms a part of the commerce of the United States with foreign nations. It is also clearly established that Congress has power to prohibit all contracts, combinations and conspiracies in restraint of such part of the foreign commerce of the United States."

Continuing with page 807 the court said:

> "The agreement directly and materially affects foreign commerce and is partly intra-territorial because it is to be carried out in part in the United States. * * *.
>
> "The prohibitions of the anti-trust statute apply broadly to contracts in restraint of trade or commerce with foreign nations. This contract directly and materially affects such commerce and if it unlawfully restrains it, it comes within the statute. We see nothing to warrant the contention that the act should be narrowly interpreted as prohibiting only contracts which are to be performed only within the territorial jurisdiction of the United States nor—*if it were for us to consider—any reason for concluding that a broader construction would lead to international complications.* * * *" (Italics supplied.)

> "Citizens of foreign countries are not free to restrain or monopolize the foreign commerce of this country by entering into combinations abroad nor by employing foreign vessels to effect their purpose. Such combinations are to be tested by the same standard as similar combinations entered into by citizens of this country. The vital question in all cases is the same: Is the combination to so operate in this country as to directly and materially affect our foreign commerce? As said by the Circuit Court of Appeals for this Court in *Thomsen v. United Castle Mail S. S. Co.*, 166 Fed. 251:
>
> "'That the combination was formed in a foreign country is likewise immaterial. It affected the foreign commerce of this country and was to be put into operation here.'
>
> "Whether or not the statute is directed against all combinations in restraint of competition, it is certain that it embraces those *in which the purpose and effect are to charge arbitrary and excessive transportation rates.* Whether the statute

> be broadly or narrowly construed, it is clear that its prohibits combinations and conspiracies to restrain the business of transporting passengers when accompanied with acts of oppression and attempts to monopolize." (Italics supplied.)

Accordingly the question of whether the decision of the court below "will embarrass or interfere with the executive branch of the United States Government in its dealings with the Republic of France and the Swiss Republic" is immaterial where it clearly appears that the public interest is involved and prejudice will result to citizens of the United States in denying to the respondent its right to proceed in the courts of this country.

When the *Thomsen* case (*supra*) eventually came before the United States Supreme Court, this court, in 243 U. S. 66, reaffirmed the principle that even though the combination in restraint of trade was formed in a foreign country it is within the proscription of the anti-trust laws. In that case the United States Supreme Court at page 88 said:

> "It is contended that the combination, if there was one, was formed in a foreign country and that, therefore, it was not within the Act of Congress; and that, besides, the principals in the combination, and not their agents, were amenable to the law. To this we do not assent. As was said by the Circuit Court of Appeals, the combination affected the foreign commerce of this country and was put into operation here (*United States v. Pacific & A. R. & Nav. Co.*, 228 U. S. 87, 33 Sup. Ct. Rep. 443). It, therefore, is within the law, and its managers here were more than simply agents, they were participants in the combination."

Both the Sherman Act and the Clayton Act apply to conspiracies in restraint of trade, entered into in foreign countries, if such conspiracies affect foreign commerce

of the United States. "Any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequence within its borders which the state reprehends" (*United States v. Aluminum Co. of America*, 148 Fed. Rep. 2d 416, 443).

In *Dennison Mattress Factory v. Spring-Air Company* (1962), 308 Fed. 2d 403, the court, at page 413, said:

> "The purpose of the anti-trust laws is to prevent a select few in a particular field from achieving such monopolistic power to stifle competition."

The complaint in this action alleges that part of the conspiracy in restraint of trade, charged against petitioner and the co-defendants, consisted of acts committed within the territorial limits of the United States. The second cause of action charges the petitioner and its co-defendants with approaching respondent's suppliers in the United States in an effort to obtain from them quantities of V. C. M. for shipment by petitioner to respondent's customers abroad, in violation of the confidential information furnished by respondent to petitioner for the purpose of arranging shipment schedules. Those acts were part of a conspiracy to by-pass the respondent and to deprive it of profits which respondent would have made by purchasing that product from American suppliers for shipment to its customers abroad (these allegations must be deemed admitted for the purposes of the motion to dismiss the complaint). It thus appears that the conspiracy which petitioner entered into in Europe was continued by it within the territorial limits of the United States, and that it was part of the purpose of petitioner to obtain a monopoly and to stifle competition.

> "Comity is a courtesy which one state extends to another by enforcing the laws of such other state when it is proper to do so, and such law is not contrary to the public policy of the state" (*County Court of Wayne County, W. Va., v. Louisa & Fort Gay Bridge Co., Inc.* [1942], 46 F. Supp. 1, 3).

The rule of "comity" does not apply where the foreign law (as in this case) is contrary to the public policy of the United States.

Recognition of the Franco-Swiss Treaty would violate a fundamental principle of public policy and justice, a prevalent conception of good morals and a deep-rooted tradition of the common weal.

Public policy therefore does not prohibit the asssumption of jurisdiction by the United States Courts of the case at bar.

On page 18 of its petition, petitioner refers to the letter sent to the Court of Appeals, Second Circuit, by the Department of State. In that letter, the Department of State said:

> "It is well settled in international law that an agreement between two countries does not create obligations on a third country if that country is not a party to the agreement nor has consented to its terms. 'A Treaty does not create either obligations or rights for a third state without its consent.' (Article 34, Vienna Convention on the Law of Treaties of April 30, 1970; Official Records of U. N. Conference on the Law of Treaties, Documents of the Conference, 289, 294); 'An international agreement does not, *per se*, impose an obligation upon a state not a party to it without the consent of that state.' (Restatement [Second], Foreign Relations Law of the United States §139). It appears that even the appellant SAGA, although

suggesting that the 1869 French-Swiss Treaty should be given effect by U. S. Courts, is not asserting that the Treaty is binding as a matter of international law on the United States. For instance, in the affidavits submitted on behalf of SAGA, Dr. Paul Chauveau recognizes that "[t]he obligation to automatically disclaim their jurisdiction wherever the case may be is made only to Swiss and/or French courts, as the negotiators of the treaty had no power to give orders to the courts of other countries such as U. S. courts" (affidavit of Paul Chauveau, 77a §9).

CONCLUSION.

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

SIDNEY O. RAPHAEL,
Counsel for Respondent.

BENJAMIN GASSMAN,
Of Counsel.